86-161 (1)

Supreme Court, U.S.
FILED
JUL 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BLACK CLOUD BUILDING CORPORATION
Petitioner
v.
ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services
Respondents

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Isabel D. Wood
Post Office Box 16146
Phoenix, Arizona 85011
(602) 248-7921

52pp

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Phoenix, Arizona 85011
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QUESTION PRESENTED

Whether the Courts of the State of Arizona violated Petitioner's right to petition a government officer for redress, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States by requiring Petitioner and Petitioner's attorney, personally, to pay attorney's fees to the government, prostituting the rights of Petitioner and intimidating others to not petition the county and state governments for redress.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, Petitioner certifies that the following is a complete list of all parties to the proceedings below:

Black Cloud Building Corporation, an Arizona corporation, Petitioner-Plaintiff

Dr. Lloyd F. Novick, Director, Arizona Department of Health Services, Respondent-Defendant

Robert G. Harman, Director, Maricopa County Department of Health Services, Respondent-Defendant

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BLACK CLOUD BUILDING CORPORATION
Petitioner
v.
ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Petitioner Black Cloud Building Corporation prays that a Writ of Certiorari issue to review the Order of the Supreme Court of Arizona entered in this matter on March 26, 1986 and the Ordered entered in this matter on May 2, 1986, as well as the Order of the Arizona Court of Appeals dated February 21, 1986, the Arizona Court of Appeals Memorandum Decision of December 17, 1985, and

the Superior Court Order of Dismissal of January 2, 1985.

OPINION BELOW

The Orders of the Supreme Court of the State of Arizona and the Court of Appeals of the State of Arizona, the Memorandum Decision of the Court of Appeals of the State of Arizona and the Order of Dismissal of the Superior Court of Maricopa County are reproduced in the Appendix.

JURISDICTION

The Supreme Court of the State of Arizona entered its Order denying Petitioner's Motion for Reconsideration on May 2, 1986 (App. 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AT ISSUE

Amendment I to the Constitution of the United States of America:

> Congress shall make no laws respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the

people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV to the Constitution of the United States of America:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Black Cloud Building Corporation was denied equal protection of the law and its right to petition the government for a redress of grievances was prostituted by the Supreme Court of the State of Arizona, the Court of Appeals of the State of Arizona and the Superior Court of Maricopa County by ordering Petitioner and Petitioner's attorney to pay attorney's fees to the government for exercising its fundamental and unalienable rights.

Background

Petitioner Black Cloud Building Corporation is

a general contractor licensed by the State of Arizona. It constructed Village East Condominiums, a 24 unit housing development in the City of Phoenix, Maricopa County, Arizona. A $7\frac{1}{2}$ feet by $7\frac{1}{2}$ feet, 36 inch deep fiberglass spa is part of the common area of the development. Petitioner believes the spa to be private whereas the Maricopa County Department of Health Services classified it semi-public, and thus subject to licensing and regulation. [1]. Respondent Robert G. Harman, Director, Maricopa County Department of Health Services, hereinafter Maricopa County, issued a Cease and Desist Order against Petitioner restricting the use of the spa on August 9, 1983. Petitioner requested Respondent Dr. Lloyd F. Novick, Director, Arizona Department of Health Services, hereinafter State of Arizona, to restrain the excessive and over zealous actions of Maricopa County, but to no avail.

---

[1] Petitioner brought a seperate parallel action for a declaratory judgment relating to various rules of Maricopa County which is not included in this Petition. Marciopa County Superior Court Cause No. C-478669, Arizona Court of Appeals No. 1 CA-CIV 7427, Arizona Supreme Court No. CV 86-0024-PR.

An administrative hearing was conducted by Maricopa County on October 20, 1983. A rehearing was timely requested by Petitioner and denied by Maricopa County.

Proceedings in the Trial Court

A complaint was filed on December 14, 1983 seeking review of Maricopa County's administrative hearing, pursuant to Arizona Revised Statutes, § 12-904. The Order of Dismissal, which is reproduced in the Appendix, states in pertinent part:

> . . . as there's more than one way to chill plaintiff's and others' rights to sue public officials . . . the Court must be careful to assure that the fee awarded these defendants is reasonable in amount.
>
> Given the above, and having considered the description of legal services on behalf of defendants Novick and Arizona Department of Health Services, the Court concludes that an award of $2,500 is both reasonable under the circumstaces (sic) and not likely to deter real estate developers or commercial contractors such as plaintiff from suing public officials when they conclude in good faith that their rights have been violated.

Petitioner raised the constitutional issues in the trial court in its Reply to Response to Motion for Amendment of Judgment:

> The purpose of this Motion is to allow the Trial Court to conform their Judgments to The United States Constitution, Amendments One and Fourteen, and Arizona State Constitution, Article II, Section 5, the right to petition a government officer for redress.

(Superior Court Record 39b).

Proceedings in the Court of Appeals

A Notice of Appeal was filed on February 1, 1985 pursuant to Arizona Revised Statutes §§ 12-120.21 and 12-2101B. The Memorandum Decision, which is reproduced in the Appendix, states in pertinent part:

> Both the State and County Health Departments have requested attorney's fees for litigating this appeal on grounds the appeal is frivolous. We agree. Pursuant to Rule 25, Arizona Rules of Civil Appellate Procedure, we award attorney's fees to both the State and the County.

The Court of Appeals filed an additional Order on February 21, 1986. The Order, which is reproduced in the Appendix, states in pertinent part:

> IT IS FURTHER ORDERED allowing appellee State of Arizona attorney's fees in the amount of $3,239.65 covering the items specified in the request for attorney's fees.
>
> IT IS FURTHER ORDERED allowing appellee Maricopa County attorney's fees in

the amount of $942.49 covering the items specified in the request for attorney's fees.

Petitioner raised the constitutional issues in the Court of Appeals in its Appellant's Opening Brief at page 9:

> The trial court's actions are a violation of Black Cloud's absolute right to seek redress from the government. The United States Constitution, Amendments One and Fourteen, and the Arizona Constitution, Article II, Section 5, give Black Cloud an absolute right to petition a government officer for redress. The trial Court is blatantly punishing Black Cloud for exercising this right to seek redress. Our forefathers fought a very bloody war over two hundred years ago to obtain this sacred right to seek redress and an arrogant trial judge cannot take away this right by imposing awards of ruinious attorney fees against one who would dare seek redress from an officer of the State of Arizona.
>
> The State of Arizona complains that the action sub judice is extremely annoying because it requires time and effort to defend their actions.(R.37a,L.20-24) If this reasoning is allowed to prevail then any petition for redress complaining of the State's actions or inactions could be classified as frivilous. In an open and free society the government's actions or inactions are always subject to challange by the people, and their right to petition for redress cannot be abridged.
>
> A.R.S.[Arizona Revised Statutes] Section 12-341.01.C does not authorize the award of attorney's fees to the government to discourage the people from petitioning for redress from oppressive rules and regulations. To so hold

would be contrary to the Arizona Constitution, Article II, Section 5, and the United States Constitution, Amendments One and Fourteen. Surely the Legislature did not intend to create unconstitutional law.

Freedom of speech, press, petition and peaceable assembly are protected by the First Amendment of the Constitution of the United States against infringement by Congress. They are likewise protected by the Fourteenth Amendment against infrigement by state legislatures. Thomas v. Collins, 323 U.S. 516, 530, 655 S.Ct. 315, 89 L.Ed. 430 (1945); De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937).. . .

> "An award of attorney's fees would be contrary to public policy . . . because it would have a chilling effect on other parties who may wish to question the legitimacy of the actions of public officials . . . we should encourage resolution of constitutional arguments in court rather than on the streets." 141 Ariz. (sic) [Wistuber v. Paradise Valley Unified School District, 141 Ariz. 346, 687 P.2d 354 (1984).

The United States District Court of Oregon defended this basic right of the people to petition the government for redress in Anderson v. Central Point School District:

> "The [United States Supreme] Court has held on numerous occasions since 1968 that any law which imposes a prior restraint on the exercise of first amendment rights come to the court 'with a heavy presumption against its constitutional validity.'Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2d 413 (1970), quoting Bantam Books, Inc. v. Sullivan, 327 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558, 96 S.Ct. 2791,

> 2802, 49 L.Ed.2d 683 (1975); New York Times Co. v. United States, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1970)." 554 FS 600 (1982)

Proceedings in the Supreme Court

A Petition for Review was filed on January 2, 1986. The Order of the Supreme Court, which is reproduced in the Appendix, states in pertinent part:

> FURTHER ORDERED: The defendants-respondents may apply to the court for the allowance of attorney's fees in opposing the petition for review. Said attorney's fees will be payable by counsel for the plaintiff-petitioner personally without being charged to the client. (Emphasis added.)

The Supreme Court filed an additional Order on May 7, 1986 denying Petitioner's Motion for Reconsideration. It also stated in pertinent part:

> "ORDERED: Statement of Attorney's Fees approved in the sum of $109.36 to Maricopa County and in the sum of $840.01 to the State of Arizona.

Petitioner raised the constitutional issues in the Supreme Court in its Petition for Review on page 8:

> Black Cloud has an absolute right under the United States constitution to use the courts of this State to seek redress from an oppressive order from a governmental agency. Black Cloud should not have to fear the financial burden of

> paying attorney's fees to the government if its action is not successful. This is not a case of repeated actions being filed. This is a request for redress; for relief from a burdensom cease and desist order. The courts of this State must remain open to the people for redress of government conduct which the people feel is burdensom. Wistuber v. Paradise Valley Unified School District, 141 Ariz. 346, 687 P.2d 354 (1984)

The issue of attorney's fees was raised again in Petitioner's Motion for Reconsideration to the Supreme Court, as well as in Petitioner's letter which was attached to the Motion. (App. 27a).

REASON FOR GRANTING THE WRIT

This case raises questions of the highest importance to the maintenance of our federal system of government. It involves claims by the courts of the State of Arizona that there is no duty on state officials to obey the United States Constitution or this Court's considered interpretation of the United States Constitution. In denying the Petition for Review and directing Petitioner's attorney to personally pay attorney's fees to the government, the Supreme Court of the State of Arizona prostituted Petitioner's fundamental and unalienable right to petition the government for redress of grievances and has discouraged others similarly situated from seeking redress in the courts.

The courts of the State of Arizona have renounced this fundamental right to petition the government for redress and have taken it upon themselves to set a fee schedule for petitioning the State and local governments.

Petitioner choose to settle a dispute with the

Maricopa County and State of Arizona Health Departments in the courts. Petitioner believed, and still does believe that its cause is meritorious. However, by exercising its fundamental and unalienable right to petition the government for redress it has been subjected to paying to the government a fee of $6,682.14 and its attorney was personally subjected to paying a fee of $949.37 to the government. [2]

This fundamental right is set forth in the First Amendment to the Constitution because the founding fathers of this Nation feared government abuses. See Allen v. State, 183 Wis. 323, 197 NW 808, 39 ALR 782.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of

---

[2] Petitioner was ordered to pay attorney's fees as follows: to the State of Arizona in Superior Court $2,500.00; to the State of Arizona in the Court of Appeals $3,239.65; to Maricopa County in the Court of Appeals $942.49; to the State of Arizona in the Supreme Court $840.01; and to Maricopa County in the Supreme Court $109.36; Total: $7,631.51.

> the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Emphases added) Amendment I to the United States Constitution.

THis fundamental and unalienable right to petition the government for redress of grievances also applies to the various states.

> . . . those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . Explicitly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. Gideon v. Wainwright, 327 U.S. 335, 341 (1963)

The State of Arizona has set a fee schedule for petitioning the government for redress of grievances: $2,500 at the Superior Court level, $4,182.14 at the Court of Appeals level and, at the Supreme Court level the attorney must himself pay $949.37.

This abuse of authority by government is an old and continuing problem. Petitioner was well aware of it. See Petitioner's letter in the appendix. (App. 27a).

> Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis. Boyd v. The United States, 116 U.S. 635, 6 S.Ct. 535, 29 L.Ed. 746.

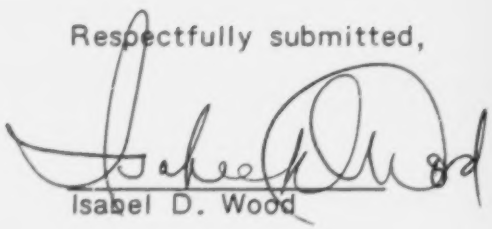
The facts, as contained in the various orders and judgments of the Arizona Courts, are indisputable. The controlling law is plain. The Superior Court and Court of Appeals of the State of Arizona violated Petitioner's constitutional rights and the Arizona Supreme Court compounded this violation by obnoxiously taxing Petitioner's attorney. The orders of the Arizona Superior Court, Court of Appeals and Supreme Court must be vacated as they apply to the award of attorney's fees to be paid by Petitioner and Petitioner's attorney to the government.

CONCLUSION

In its opinion, the Supreme Court of the State of Arizona made several determinations which, taken singly or together, deprived Petitioner of its right to petition a government officer for redress, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

For these reasons, a Writ of Certiorari should be granted.

Respectfully submitted,



Isabel D. Wood

Date: July 30, 1986.

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, i.e., on Respondents by hand delivering same to counsels of record as follows:

Chip Wagoner
Assistant Attorney General
State of Arizona
1275 West Washington Street
Phoenix, Arizona 85007
Attorney for Dr. Lloyd F. Novick

Barbara Lee Caldwell
Deputy County Attorney
Office of the Maricopa County Attorney
Civil Division
201 West Jefferson, 7th Floor
Phoenix, Arizona 85003
Attorney for Robert G. Harman

Dated this 30th day of July, 1986.

Isabel D. Wood

SEAL

SUPREME COURT

STATE OF ARIZONA

201 West Wing State Capital
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone (602) 255-4536

David R. Cole
Clerk

Diana K Bentley
Chief Deputy Clerk

May 7, 1986

RE: BLACK CLOUD BUILDING CORPORATION vs.
ROBERT G. HARMAN et al
Supreme Court No. CV-86-0035-PR
Court of Appeals No. 1 CA-CIV 8246
Maricopa County No. C-502759

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 6, 1986, in regard to the above-referenced cause:

"ORDERED: Statement of Attorney's Fees approved in the sum of $109.36 to Maricopa County and in the sum of $840.01 to the State of Arizona.

FURTHER ORDERED: Motion for Reconsideration = DENIED.

Justice Hays did not participate in the determination of this matter."

DAVID R. COLE, Clerk

TO:

David Postal, Esq.
Thomas E. Collins, Maricopa County Attorney
Attn: Barbara Lee Caldwell, Esq.
Hon. Robert K. Corbin, Attorney General
Attn: Sheldon H. Muller, Esq.

pgk

SEAL

SUPREME COURT

STATE OF ARIZONA

201 West Wing State Capital
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone (602) 255-4536

David R. Cole
Clerk

Diana K Bentley
Chief Deputy Clerk

March 26, 1986

RE: BLACK CLOUD BUILDING CORPORATION vs.
ROBERT G. HARMAN et al
Supreme Court No. CV-86-0035-PR
Court of Appeals No. 1 CA-CIV 8246
Maricopa County No. C-502759

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 25, 1986, in regard to the above-referenced cause:

"ORDERED: Petition for Review = DENIED.

"FURTHER ORDERED: The defendants-respondents may apply to the court for the allowance of attorney's fees in opposing the petition for review. Said attorney's fees will be payable by counsel for the plaintiff-petitioner personally without being charged to the client.

"Justice Hays did not participate in the determination of this matter."

Record returned to the Court of Appeals, Division One, Phoenix, this 26th day of March, 1986.

DAVID R. COLE, Clerk

TO:

David R. Postal, Esq.
Thomas E. Collins, Maricopa County Attorney - Attn: Barbara Lee Caldwell, Esq.
Hon. Robert K. Corbin, Attorney General - Attn: Norman Chip Wagoner, Esq.
Glen D. Clark, Clerk, Court of Appeals, Division One

mag

RWD:kw:14.12

Division I
Court of Appeals
State of Arizona
Filed FEB 21 1986
Glen D. Clark, Clerk
By M. Chvey

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BLACK CLOUD BUILDING CORPORATION, an Arizona corporation, Plaintiff-Appellant, v. ROBERT G. HARMAN, Director Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services, Defendants-Appellees.	1 CA-CIV 8246 DEPARTMENT D MARICOPA County Superior Court No. C-502759 O R D E R

Appellee State of Arizona's request for attorney's fees, appellee Maricopa County's request for attorney's fees and appellant's objections thereto were considered by the court, Judges Eino M. Jacobson. Sarah D. Grant and Jack L. Ogg participating.

IT IS ORDERED overruling said objections.

IT IS FURTHER ORDERED allowing appellee State of Arizona attorney's fees in the amount of $3,239.65 covering the items specified in the request for attorney's fees.

IT IS FURTHER ORDERED allowing appellee Maricopa County attorney's fees in the amount of $942.49 covering the items specified in the request for attorney's fees.

DATED this 21st day of February, 1986.

/s/ Eino M. Jacobson
EINO M. JACOBSON, JUDGE

A true copy of the foregoing
order was mailed this 21st
day of February 1986, to:

Mr. David R. Postal
Attorney at Law
4449 North 12th Street
Suite 10
Phoenix, Arizona 85014
Attorney for Plaintiff-Appellants

Mr. Chip Wagoner
Assistant Attorney Generai
1275 West Washington Street
Phoenix, Arizona 85007
Attorneys for Defendants-Appellees

Mr. Jonathan H. Schwartz
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
Attorneys for Defendant-Appellees
Dept Health Services

GLEN D. CLARK, Clerk
By

/s/ Margaret M. Chvey

Deputy Clerk

Division 1
Court of Appeals
State of Arizona
Filed DEC 17 1985
Glen D. Clark, Clerk
By R. Ortegon

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BLACK CLOUD BUILDING CORPORATION, an Arizona corporation, Plaintiff-Appellate, v. ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services, Defendants-Appellee.	1 CA-CIV 8246 DEPARTMENT D MEMORANDUM DECISION Not for publication--Rule 28, Arizona Rules of Civil Appellate Procedure

Appeal from the Superior Court of Maricopa County

Cause No. C-502759

The Honorable B. Michael Dann, Judge

AFFIRMED

David R. Postal, P.C. Phoenix
by David R. Postal
Attorney for Plaintiff-Appellant

Tom Collins, Maricopa County Attorney Phoenix
by Barbara Lee Caldwell, Deputy County Attorney
and
Robert K. Corbin, Attorney General Phoenix
by Chip Wagoner, Assistant Attorney General
Attorneys for Defendants-Appellees

J A C O B S O N, Judge

In this appeal from a special action, the appellant, Black Cloud Building Corporation (Black Cloud), challenges the validity of an administrative decision issued by a hearing officer of the Maricopa County Health Department (County Health Department). The trial court dismissed Black Cloud's complaint and entered judgment in favor of both defendants-appellees. The trial court also awarded attorney's fees to the appellee Lloyd Novick, Director of the Arizona Department of Health Services (State Health Department).

On appeal, Black Cloud raises three issues for our determination: (1) whether Black Cloud was denied due process because of a lack of findings of fact and conclusions of law in the final written decision of the County Health Department's hearing

officer; (2) whether the trial court erred in granting appellee Lloyd Novick's motion to dismiss Black Cloud's complaint; and (3) whether the trial court erred in awarding attorney's fees pursuant to A.R.S. § 12-341.01(C) to Lloyd Novick and the State Health Department for a proundless or frivolous lawsuit. In its brief, the appellee Maricopa County also urges us to consider the trial court's denial of a requested award of attorney's fees for the County. However, since no cross-appeal has been filed by the County, the judgment of the trial court on that issue must stand, even though it may have been incorrect. Walker v. Walker, 18 Ariz. App. 113, 500 P.2d 898 (1972).

The facts in this case are not in material dispute and are best understood in conjunction with the facts of a companion case that preceded this lawsuit. See Black Cloud v. Maricopa County, ____ Ariz. ____, ____ P.2d ____ (filed December 10, 1985). Prior to November, 1982, Black Cloud began constructing the Village East Condominiums in Phoenix.

As part of that project, Black Cloud installed a fiberglass spa in the common area of the condominium development. In violation of the Maricopa County Health Code, Black Cloud failed to submit plans and to obtain a permit for the spa from the County Health Department.

After the County Health Department notified Black Cloud of these and other Health Code violations concerning the spa, Black Cloud brought a declaratory judgment action in superior court against Maricopa County (No. C-478669). In its complaint, Black Cloud challenged the authority of the County Health Department to define semipublic pools and bathing places and to issue licenses and assess fees. On July 22, 1983, the superior court denied Black Cloud's motion for summary judgment, concluding that under Arizona law the County had the right to regulate the installation and inspection of semipublic pools and to issue licenses and assess fees. On September 21, 1983, the trial court granted summary judgment in Cause No. C-478669 in favor of the

County Health Department. We have upheld that judgment on appeal. Black Cloud, supra.

While the superior court litigation was proceeding, on August 9, 1983, the County Health Department administratively issued a cease and desist order directing Black Cloud to cease operating the spa until such time as Black Cloud complied with the relevant County Health Code provisions. On August 16, 1983 Black Cloud requested an administrative hearing to review the cease and desist order. Pursuant to that request, a hearing was held on October 20, 1983 and a written decision was entered on November 10, 1983 by a hearing officer from the County Health Department. In this decision, the hearing officer found that a bathing place had been constructed at the Village East Condominiums and that the superior court had ruled that this bathing place was subject to regulation by the County Health Department. The officer then concluded that the superior court's ruling had mooted any decision which he might render in this matter. As a result, the officer declined to

enter any administrative orders.

On December 14, 1983, Black Cloud filed a second complaint in superior court (No. C-502759). This time Black Cloud sought special action review of the administrative proceedings, alleging that it had been denied due process because the administrative decision lacked findings of fact and concludions of law. In its complaint, Black Cloud listed the Director of the County Health Department as a defendant and, for the first time in all of this litigation, added the Director of the State Health Department as a defendant.

On February 7, 1984, the trial court granted the County Health Department's motion to dismiss the complaint, concluding that the issues raised therein had been previously litigated. On January 3, 1985, a formal order of dismissal was filed in the superior court which also dismissed the complaint against Director Novick of the State Health Department and granted judgment in favor of both defendants. Pursuant to A.R.S. § 12-341.01(C) and

local Rule 3.7(e), the court awarded $2,500.00 in attorney's fees to Director Novick and the State Health Department.

Black Cloud first maintaines that it was denied due process for lack of findings of fact and conclusions of law in the November 10, 1983 decision of the County Health Department's hearing officer. This contention is clearly without merit because the written decision of the County Health Department's hearing officer did contain the necessary findings of fact and conclusions of law. As stated, the written decision of the hearing officer included a factual finding that a bathing place had been constructed and a legal conclusion that the trial court's prior ruling had mooted any decision which the officer might make. This fully complies with A.R.S. § 41-1011.

Black Cloud next argues that the trial court erred in dismissing the complaint against the Director of the State Health Department on the basis that when the County Health Department issued the August 9, 1983 cease and desist order, it was acting as an

agent of the State Health Department and therefore, the State Health Department is responsible as a principal for the conduct of the County Health Department.

The sole support offered by Black Cloud for the existence of the alleged agency relationship is the delegation agreement currently in effect between the State and County Health Departments. There is absolutely nothing in that agreement which would legally establish an agency relationship between the State and County. Moreover, as early as 1974, this Court held that the legislation dealing with health problems envisioned, not an agency relationship, but rather an independent multi-level governmental system consisting of state, county and municipal boards of health. State v. Kelsall, 22 Ariz. App. 97, 523 P.2d 1334 (1974).

Finally, assuming Black Cloud's contention had any merit whatsoever, the superior court in a judicial review of an administrative proceeding only acquires jurisdiction over those persons who were parties to

the administrative proceedings. A.R.S. § 12-908; Roer v. Superior Court In and For Coconino County, 4 Ariz. App. 46, 417 P.2d 559 (1966). Since the State Director was not joined in the proceedings before the County Board, he could not be joined in the superior court review of that proceeding.

At oral argument, Black Cloud hinted that the Director of the State Health Department had been joined in the second lawsuit against the County because the State Director has a statutory duty to oversee the County's regulation of public and semipublic pools. Black Cloud further claims that the State Director erroneously failed to dischsrge this duty after the time when he was informed by Black Cloud of the dispute over the spa with the County. This argument is inapposite given the posture of this appeal and the nature of Black Cloud's original complaint in this lawsuit. Even if Black Cloud's claim that the State Director had a legal duty to oversee the County were true, the proper method to compel performance of such a duty is to apply for

a writ of mandamus pursuant to A.R.S. § 12-2021-2030. Black Cloud made no efforts to apply for this writ and instead chose simply to join the State Health Director in a lawsuit against the County. In short, we find the attempt to join the State Director to be completely without merit.

Black Cloud's final argument is that the trial court erred in awarding attorney's fees pursuant to A.R.S. § 12-341.01(C) in favor of the State Health Department. Specifically, Black Cloud maintaines that A.R.S. § 12-341.01(C) does not authorize an award of attorney's fees where a litigant is exercising his or her right to seek redress from the government. In addition, Black Cloud argues that an award of attorney's fees under A.R.S. § 12-341.01(C) requires a finding by clear and convincing evidence that the claim constitutes harrassment, is groundless and not made in good faith. According to Black Cloud, the trial court did not make this required finding and thus the award cannot stand. Lastly, Black Cloud asserts that an award of attorney's fees

in this case is contrary to A.R.S. § 12-348(A)(3).

A.R.S. § 12-341.01 provides that:

> [r]easonsble attorney's fees shall be awarded . . . upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith . . ..

A.R.S. § 12-341.01(C).

In Wistuber v. Paradise Valley Unified School Dist., 141 Ariz. 346, 687 P.2d 354 (1984), the Supreme Court held that where aggrieved citizens in good faith seek a determination of the legitimacy of governmental actions, attorney's fees should not usually be awarded in contract actions under A.R.S. § 12-341.01(A). However, the Court went on to state that "[i]f an action brought against a governmental body is groundless or frivolous, or is brought for the purpose of harassing that body, the court has discretion to award attorney's fees quite apart from any contractual theory. See A.R.S. § 12-341.01(C)." Wistuber, 141 Ariz. at 350, 687 P.2d at 358.

In this case, the trial court found that "no good (or even colorable) reason" had been shown for

joining Director Novick in the second lawsuit against the County. As previously indicated, this finding is fully supported.

A.R.S. § 12-341.01(C) was enacted to provide compensation to parties who are required to defend meritless claims. The State Health Department was not in any way connected with the cease and desist order and subsequent administrative hearing involving the County Health Department. Therefore, the claim brought by Black Cloud against Director Novick was without merit and served only to harass the State.

Finally, an award of attorney's fees to the State in this case is not contrary to A.R.S. § 12-348. That statute provides that:

> [i]n addition to any costs which are awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state or a city, town or county which prevails by an adjudication on the merits in any of the following:
>
> . . .
>
> 3. A court proceeding to review a state agency decision pursuant to chapter 7, article 6 of this title, or any other statute authorizing judicial review of agency decisions. (Footnote omitted

and emphasis added).

A.R.S. § 12-348(A)(3) (Supp. 1984).

By its own terms, this statute addresses a situation where attorney's fees are awarded as a supplement to fee awards made pursuant to other statutes. In other words, A.R.S. § 12-341.01 and 12-348 operate independently of each other and the latter was not intended to be used to preclude fee awards under the former.

Both the State and County Health Departments have requested attorney's fees for litigating this appeal on grounds the appeal is frivolous. We agree. Pursuant to Rule 25, Arizona Rules of Civil Appellate Procedure, we award attorney's fees to both the State and the County. Both of the appellees should comply with Rule 21(c), Arizona Rules of Civil Appellate Procedure.

Judgment affirmed.

/s/ Eino M. Jacobson

Eino M. Jacobson, Judge

CONCURRING:

/s/ Sarah D. Grant

Sarah D. Grant, Presiding Judge

/s/ Jack L. Ogg

Jack L.Ogg, Judge

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Attorneys for Defendant, Dr. Lloyd F. Novick,
Director of the Arizona Department of Health Services

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

BLACK CLOUD BUILDING CORPORATION, an Arizona corporation,	)	NO C-502759
Plaintiff,	)	ORDER OF DISMISSAL
vs.	)	(Assigned to the Honorable B. Michael Dann, Division 32)
ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona	)	

Department of Health Services,)
)
Defendants.)
)

The Court having reviewed the Motion to Dismiss filed by Defendant Robert G. Harman herein, the response thereto filed by the Plaintiff and the reply filed by Defendant Harman and having reviewed the file herein, concludes that the issues raised in Plaintiff's complaint herein have previously been litigated in Cause No. C-478669, which is presently on appeal in the Court of Appeals, Cause No. CIV-7375.

The Court having reviewed the Motion to Dismiss filed by Defendant Donald B. Mathis, (predecessor of Lloyd F. Novick), herein, the response thereto filed by the Plaintiff, and the reply filed by Defendant Mathis (Novick) and having reviewed the file herein, concludes that no valid claim for relief has been stated as against Lloyd F. Novick or the Arizona Department of Health Services.

IT IS ORDERED that Defendant Harman's Motion to Dismiss is Granted

IT IS ORDERED that Defendant Novick's Motion to Dismiss is Granted

IT IS FURTHER ORDERED that there being no just reason for delay, judgment is hereby entered in favor of defendants Robert G. Harman, the Maricopa County Department of Health Services, Lloyd F. Novick and the Arizona Department of Health Services pursuant to Rule 54(b), Arizona Rules of Civil Procedure.

With respect to attorney's fees, the Court having previously taken under advisement the Plaintiff's Objections to Defendants' Application for Attorneys' Fees and the Court having considered the arguments of counsel, concludes that the earlier judgment in favor of defendants Harman and the Maricopa County Department of Health Services is subject to revision since it does not contain a Rule 54(b) certification. The earlier award of attorneys' fees in favor of said defendants is vacated, the Court being unable to say that plaintiff's claims against defendants Harman and the Maricopa County

Department of Health Services were baseless and in bad faith. See Wistuber v. Paradise Valley Unified School District, ____ Ariz. ____, 687 P.2d 354 (1984). Thus, plaintiff's Motion to Amend that judgment is granted.

However, plaintiff's objection to the Application for Attorneys' Fees of defendant Novick and Arizona Department of Health Services is overruled, no good (or even colorable) reason having been shown for joining these defendants in plaintiff's dispute with the County agency. However, as there's more than one way to chill plaintiff's and others' rights to sue public officials (Wistuber, supra) the Court must be careful to assure that the fee awarded these defendants is reasonable in amount.

Given the above, and having considered the description of legal services on behalf of defendants Novick and Arizona Department of Health Services, the Court concludes that an award of $2,500 is both reasonable under the circumstances and not likely to deter real estate developers or commercial contractors

such as plaintiff from suing public officials when they concluded in good faith that their rights have been violated.

IT IS ORDERED that the earlier award of attorneys' fees in favor of defendants Harman and Maricopa County Department of Health Services is vacated.

IT IS ORDERED that Defendants Lloyd F. Novick and the Arizona Department of Health Services be awarded the sum of TWO THOUSAND FIVE HUNDRED DOLLARS AND 00/100 CENTS ($2,500.00) as and for attorneys' fees pursuant to A.R.S. § 12-342.01.C. and Local Rule 3.7(e).

DONE IN OPEN COURT this 2nd day of January, 1985.

/s/ B. Michael Dann

THE HONORABLE B. MICHAEL DANN
Judge of the Superior Court

6331A-3

LOGO Black Cloud Building Corporation
P.O.Box 16146.Phoenix, Arizona 85011
(602) 277-6001

December 20, 1985

Mr. David R. Postal
3601 North 7th Avenue, Suite B
Phoenix, Arizona 85013

Re: BLACK CLOUD v. MARICOPA COUNTY,
1 CA-CIV 7427 (C-478669);
BLACK CLOUD v. HARMAN & NOVICK,
1 CA-CIV 8246 (C-502759)

Dear David:

I have given careful consideration to your advice to forego any further appeal of the subject actions. I understand your belief that any further appeal will probably be fruitless and that the Arizona Supreme Court may grant further sanctions against Black Cloud. However, I feel very strongly that the County and State have overstepped their authority and that their conduct constitutes the taking of my property rights without compensation under the guise of police power.

The Court of Appeals has failed to come to grips

with the issues. For instance they reject the clear language of the delegation agreement between the County and the State as meaning anything, and the failure to allow for redress. It seems that occassionally the Arizona Five see through the wool, and will tackle the more difficult issues with a clear eye.

I have an absolute right to request redress of the County and State for the wrongs that I believe they have committed. I also have an absolute right to take my request for redress to the United States Supreme Court. I must exhaust all state remedies before I can take my request for redress to the United States Supreme Court. This requires that I petition the Arizona Supreme Court for review of the Court of Appeals decision. I realize we have much more strength in the original action, however I don't believe I can preserve only that action.

I will not be denied my right of access to the

United States Supreme Court by the threat of sanctions. File a Petition for Review in both cases, time does not permit me to find other counsel for the Petition for Review. If you do not wish to carry these cases to the United States Supreme Court I will retain other counsel.

Sincerely,

/s/ Isabel D. Wood
Isabel Wood
President